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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 388

CITY OF CORAL GABLES, A MUNICIPAL CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA,

Petitioner,

vs.

ED. C. WRIGHT, DOING BUSINESS AS ED. C. WRIGHT & COMPANY, SUCCESSOR TO ED. C. WRIGHT & COMPANY, INC., AND AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, A NATIONAL BANKING CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.

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INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinions below	2
Jurisdiction	2
Statute involved	2
Summary and short statement of the matter involved	3
Questions presented	7
Reasons relied on for allowance of writ	8
Brief in support of petition for writ of certiorari	13
I. Factual background of the case	13
II. The Court of Appeals misinterpreted the purpose of Section 83 (j) of the Municipal Bankruptcy Act and the effect which should be given to it in the instant case	21
III. The plan of composition was offered and accepted in good faith	25
IV. There is no lack of identity of interests of those consenting in the instant case with those compelled by their consents to accept the plan	29
(a) There is no lack of identity of interest.	29
(b) "Changed conditions" do not alter identity of interest of consenting and non-consenting creditors	33
(c) Opinion should be clarified	35
V. The Circuit Court of Appeals in its decision arbitrarily reversed the Master and the District Court in their specific findings of fact, which findings by the Trial Court are amply supported by the record	36
Conclusion	42

TABLE OF AUTHORITIES CITED

Statutes Cited—Acts of Congress

Bankruptcy Act—Chapter IX:	
Sec. 82, Definitions (11 U. S. C. A. 402)	25
Sec. 83 (j), (22 U. S. C. A. 403 (j))	22
Sec. 83 (e), (11 U. S. C. A. 403 (e))	25

Rules and Orders.

Page

Rule 53 (e) (2)—Rules of Civil Procedure for the District Court of the United States 10,36
General Order 47, 11 U. S. C. A. 115, following section 53 10,36

List of Cases.

American National Bank of Nashville, Tennessee v. *City of Sanford, Florida*, 5 Cir., 112 F. 2d 435; Certiorari denied, 311 U. S. 677, 85 L. Ed. 436, 61 Sup. Ct. 45 3,22,32
American United Mutual Life Ins. Co. v. *City of Avon Park*, 311 U. S. 138, 61 Sup. Ct. 157, 85 L. Ed. 91 11,24,26
Coral Gables, City of v. *State of Florida*, 128 Fla. 874, 176 So. 40 15
Davis v. *City of Homestead*, 5 Cir., 112 F. 2d 438; Certiorari denied, 311 U. S. 678, 85 L. Ed. 436, 61 Sup. Ct. 45 41
Evergreen Farms Co. v. *Willacy Co. Water Control Imp. Dist.*, 5 Cir., 124 F. 2d 1 24
Fano v. *Newport Heights Irr. Dist.*, 9 Cir., 114 F. 2d 563. 11,27
Getz v. *Edinburg C. I. School Dist.*, 5 Cir., 101 F. 2d 734. 11,27
Kaufman County Levee Imp. Dist. No. 4 v. *Mitchell*, 5 Cir., 116 F. 2d 959 11,24,26
Kelly v. *Everglades Drainage Dist.*, 5 Cir., 132 F. 2d 742. 29
McDonald v. *Banta Carbona Irr. Dist.*, 9 Cir., 123 F. 2d 968; Certiorari denied, 316 U. S. 668, 86 L. Ed. 1743, 62 Sup. Ct. 1034 .....
Morris Plan Industrial Bank v. *Henderson*, 2 Cir., 131 F. 2d 975 10
Ouerbacker v. *Henderson County*, 4 Cir., 126 F. 2d 309; Certiorari denied, 317 U. S. 654, 87 L. Ed. 40, 63 Sup. Ct. 51 9,22,29
Roberts v. *Board of Public Instruction of Broward Co., Florida*, 5 Cir., 117 F. 2d 943; Certiorari denied, 313 U. S. 582, 85 L. Ed. 1539, 61 Sup. Ct. 1101 28
Security-First Nat. Bank v. *Rindge*, 85 F. 2d 557, 86 F. 2d 3; Certiorari denied, 299 U. S. 613, 57 Sup. Ct. 315, 107 A. L. R. 1249 29
Snyder v. *Fenner*, 3 Cir., 101 F. 2d 736 11,26

Page

Tenn. Pub. Co. v. *American Nat. Bank of Nashville, Tenn.*, 290 U. S. 18, 81 L. Ed. 13, — Sup. Ct. —.... 11,26

Taylor v. *Provident Irr. Dist.*, 9 Cir., 123 F. 2d 965; Certiorari denied, 315 U. S. 821, 86 L. Ed. 1217, 62 Sup. Ct. 914..... 11,25

Thomas v. *El Dorado Irr. Dist.*, 9 Cir., 126 F. 2d 922; Certiorari denied, 317 U. S. 660, 87 L. Ed. 42, 63 Sup. Ct. 59.....11,25,29

Town of Belleair, Fla. v. *Groves*, 5 Cir., 132 F. 2d 542; Certiorari denied, — U. S. —, 87 L. Ed. 623, 63 Sup. Ct. 762.....11,24,26

Wells Fargo Bank & Union T. Co. v. *Imperial Irr. Dist.*, et al (April 28, 1943) 9 Cir., 136 F. 2d 539.....9,22,31

West Coast Life Ins. Co. v. *Merced Irr. Dist.*, 114 F. 2d 654; Certiorari denied, 311 U. S. 718, 85 L. Ed. 467, 61 Sup. Ct. 441..... 11,27

SUPREME COURT OF THE UNITED STATES

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vs.

ED. C. WRIGHT, DOING BUSINESS AS ED. C. WRIGHT & COMPANY, SUCCESSOR TO ED. C. WRIGHT & COMPANY, INC., AND AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, A NATIONAL BANKING CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Supreme Court of the United States, and to the Honorable Chief Justice and Associate Justices Thereof:

The petitioner prays that a writ of certiorari issue to review the judgment (R. 1872) of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on July 9, 1943, reversing the interlocutory decree (R. 1829) of the District Court of the United States for the Southern District of Florida. A petition for re-

hearing was filed (R. 1873) and the same was denied on August 12, 1943 (R. 1888).

Opinions Below.

The opinion of the United States Circuit Court of Appeals (R. 1860) is not yet reported. The order of the District Court (R. 1773) dated August 19, 1942, affirming and approving the report of the Special Master (R. 321) is unreported.

Jurisdiction.

The jurisdiction of this Court is invoked under the Federal statute authorizing and permitting a municipal corporation to file a petition in bankruptcy. The sections of the Federal statute which petitioner, City of Coral Gables, Florida, invokes are sections 81-84 of Chapter IX of the Bankruptcy Act of August 16, 1937, 50 Statutes 654, as amended by the act of June 22, 1938, 52 Statutes 940, 11 U. S. C. A., sections 401-404. The appeal below was taken by the appellants under 11 U. S. C. A., section 47. This petition for writ of certiorari is permitted by section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A., section 347 (a).

Statute Involved.

The statute involved is the Municipal Bankruptcy Act cited above under Jurisdiction. The pertinent provision of said bankruptcy act is subsection 83 (j), reading as follows:

> "The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this title by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this title, and the written consent of the holders of any se-

curities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition. July 1, 1898, c. 541, sec. 83; Aug. 16, 1937, c. 657, 50 Stat. 655; June 22, 1938, c. 575, sec. 3 (b), 52 Stat. 940."

11 U. S. C. A., sec. 403 (j).

Summary and Short Statement of the Matter Involved.

The matter involved is the interpretation of section 83 (j) and other sections of the Municipal Bankruptcy Act and their application to the particular situation presented by the record in this case.

The constitutionality of section 83 (j) has been passed upon by this court in its denial of the petition for certiorari in the case of *American National Bank of Nashville, Tennessee* v. *City of Sanford, Florida*, 5 Cir., 112 F. (2d) 435; *Certiorari denied*, 311 U. S. 677, 85 L. Ed. 436, 61 S. C. 45.

This case presents to the Supreme Court for the first time questions involving the interpretation and application of section 83 (j) to a particular plan of composition and a particular state of facts as shown by the rceord.

On June 27, 1940, proceeding under the authority of Ordinance No. 347 (R. 108), adopted March 5, 1940, the City of Coral Gables, Florida, filed a petition (R. 1) in the District Court of the Southern District of Florida, under the Municipal Bankruptcy Act of August 16, 1937, as amended by the act of June 22, 1938, for the purpose of obtaining the approval of a plan of composition which in effect would require a minority, who had refused to settle on the proposed terms, to accept refunding securities of a similar character and nature as had been accepted previously by 90% of other creditors of the same class. Copies of Ordinance No. 347 (R. 108), adopted March 5, 1940, and Ordinance No. 269 (R. 57), adopted December 23, 1936, as amended by Ordi-

nance No. 289 (R. 96), adopted September 4, 1937, were attached as exhibits to the petition.

Said Ordinances 269 and 289 constitute the plan of composition and provided that each creditor should receive refunding bonds equal to 50% of the principal of his claim and tax participation certificates for the balance, or 50% of the principal plus all unpaid interest to January 1, 1937 (R. 62).

The refunding bonds pledge the full faith and credit of the City of Coral Gables and are general obligations of the City, while the tax participation certificates merely evidence the right of the holders to participate ratably in the Tax Participation Certificate Fund (R. 79). The plan of composition provides that certain minimum future annual debt service tax levies will be made, in accordance with a schedule set forth in said plan, from the proceeds of which shall be paid the interest on the refunding bonds and Sinking Fund requirements, and that there shall be distributed annually to the holders of the tax participation certificates such surplus as might be available after the payment of the interest and Sinking Fund requirements, all of which is more particularly set forth in said plan of composition.

At the time of the passage of Ordinance No. 269, on December 23, 1936, the outstanding bonded indebtedness of the City amounted to $7,977,000.00 principal and $2,707,902.17 accrued interest (R. 58). The City was also indebted on other obligations amounting to $412,073.90 principal and $134,317.98 accrued interest (R. 60).

The City's contracts with creditors to accept the plan provided that the same would not be put into effect until at least 90% of the creditors had agreed to accept the proposed refunding securities (R. 1477, 1482), and the plan contemplated a 100% exchange of securities. The delivery of refunding bonds and tax participation certificates began on September 24, 1937, approximately one month after the

enactment of the present Municipal Bankruptcy Act on August 17, 1937, and the City at that time exchanged 90% in amount of its outstanding debts.

The plan of composition provides in section 12 (R. 87-9), that, in consideration of the creditors waiving and relinquishing all of their right to participate in the proceeds of the liquidation of delinquent tax assets represented by delinquent taxes and special assessments imposed prior to January 1, 1936, the City would, over a period of ten years, cancel $500,000.00 of refunding bonds, and that, if the City did not acquire and cancel refunding bonds according to said schedule each year, then it would be obligated in the next year to levy special taxes to raise funds for the purpose of purchasing refunding bonds to carry out this retirement schedule.

The plan also provides in section 19 (R. 92), that the City can purchase for its own use and benefit any of its refunding obligations with funds derived from sources of revenue other than those sources pledged to the servicing of the refunding securities under the plan. The funds so pledged are (a) the Issue of January 1, 1937 Fund (R. 72), being the proceeds from the collection of the minimum debt service tax levy required in the plan, (b) the Sinking Fund (R. 74), (c) the Tax Participation Certificate Fund (R. 78), and (d) the $500,000 Fund provided for by section 12 of the plan (R. 87).

Other provisions of the plan of composition will be described where they are pertinent and material to the argument hereinbelow.

The petition alleged that the City "owns, holds or controls or has cancelled" its refunding bonds in the face amount of $475,198.98 and its tax participation certificates in the amount of $234,746.92 (R. 5), and that six of the City's creditors hold judgments on old bonds and coupons with peremptory writs of mandamus requiring special ear-

marked tax levies for the servicing and payment of said judgments over a period of years, and that a part of the indebtedness evidenced by such judgments had been paid from such special source of taxation on and prior to the filing of the petition (R. 8, 42-53).

Ed. C. Wright and the American National Bank of Nashville, Tennessee, respondents, appellants in the Circuit Court of Appeals, filed answers and objections to the confirmation of the plan in the District Court (R. 136, 145, 171) and opposed the confirmation of the plan and claimed, among other things, that the petition was not filed in good faith and that the plan of composition submitted had been abandoned and completed and was not a partially completed plan within the meaning of section 83 (j) of the Municipal Bankruptcy Act.

The case was referred to a special master to take the testimony of the respective parties, and, after the taking of testimony over a period of more than one year, and after extensive argument of counsel, the special master made specific findings of fact and law on the contentions of dissenting creditors and recommended to the District Court that a decree be entered confirming the plan in accordance with his findings (R. 321-335) against the contentions of the dissenting creditors.

Thereafter, upon exceptions (R. 1719, 1726) filed by the objecting creditors, the case was further extensively argued before the District Judge, and, after considering the voluminous testimony and report of the Master over a period of several months, he confirmed the report of the Special Master (R. 1773). On November 20, 1942, an interlocutory decree approving and confirming the plan was entered by the District Judge (R. 1829). The objecting creditors appealed to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the interlocutory decree and remanded the case to the District Court (R. 1872).

Questions Presented.

1. The Circuit Court of Appeals for the Fifth Circuit erred in holding that the petitioner City did not act in good faith in filing its petition in this case for the sole purpose of coercing a small minority of objecting creditors to accept the plan of composition.

2. The Circuit Court of Appeals erred in its interpretation of section 83 (j) in holding in effect that the Municipal Bankruptcy Act is not available to a city "under changed conditions" which have arisen subsequently to a partial voluntary refunding of its debts whether or not such "changed conditions" affect in a similar manner and degree the rights of all creditors, consenting and nonconsenting.

3. The Circuit Court of Appeals erred in reversing the findings of fact made by the Special Master and the District Judge, without such findings appearing to be clearly erroneous.

4. The Circuit Court of Appeals erred in holding that the plan was not submitted in good faith and is not fair to opposing creditors, and that consents were requested and were to be used to "bludgeon into submission" the nonconsenting bondholders.

5. The Circuit of Appeals erred in allowing its decision to turn on statements of alleged fact which do not appear in the record. There is no evidence in the record to support the statements of the Circuit Court of Appeals:

(a) that the voluntary plan had been accepted in 1937 under an express understanding that bankruptcy would not be resorted to (R. 1864);

(b) that, when 90% had accepted, the plan was closed and abandoned as to the remaining nonconsenting bondholders (R. 1866);

(c) that the present proceeding is an entirely new proceeding and in no proper sense a completion of the partially completed plan (R. 1866);

(d) that the plan had been carried to completion as such in 1937 by the acceptance of more than the 90% which the plan required to make it effective (R. 1861).

6. The Circuit Court of Appeals erred in assuming that there is lacking in the instant case the identity of interest of the consenting creditors with the non-consenting creditors who will be compelled by the consents and confirmation to accept the plan of composition.

7. The Circuit Court of Appeals, by holding that the Municipal Bankruptcy Act of August 16, 1937, as supplemented by the addition of section 83 (j) by the Act of June 22, 1938, was not intended to extend to the situation presented in this case, erred in deciding an important question of federal law which has not been, but should be, settled by the Supreme Court.

8. The decision of the Circuit Court of Appeals conflicts with other decisions of the Circuit Court of Appeals of the Fifth Circuit and with decisions of other circuit courts of appeals.

9. The Circuit Court of Appeals in this case has decided a federal question in a way probably in conflict with the applicable decisions of this Court.

10. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

Reasons Relied On for Allowance of Writ.

This case presents questions of the first importance relating to the purpose, interpretation, and application of section 83 (e) (5) and section 83 (j) of the Municipal Bankruptcy Act, which have not heretofore been passed

upon by this Court except indirectly by the denial of petitions for certiorari in other cases.

An authoritative decision of these questions by this Court is of pressing importance, not only to the parties to this cause, but also to the numerous municipalities and other taxing agencies which have partially completed plans of refunding and have found or may find it necessary to resort to bankruptcy to accomplish the completion of the refunding of their indebtedness.

The decision of the Circuit Court of Appeals in the instant case is in conflict with other decisions of circuit courts of appeals which this Court declined to review on petitions for certiorari.

It is submitted that the purpose of section 83 (j) is to afford to municipalities and other taxing agencies a bankruptcy proceeding under which the complete 100% refunding of its obligations may be coerced by governmental power, although some of the obligations have theretofore been refunded under one or more voluntary plans of refunding. It is further contended that the purpose of said section is not limited, as held in the instant case, to the completion of the identical plan of refunding as first partially carried out by the taxing agency.

Ouerbacker v. *Henderson County*, 4 Cir., 126 F. 2d 309; certiorari denied, 317 U. S. 654, 87 L. Ed. 40, 63 S. C. 51.

Wells Fargo Bank & Union T. Co. v. *Imperial Irr. Dist., et al.* (April 28, 1943), 9 Cir., 136 F. 2d 539.

In the decision of the Circuit Court of Appeals in the instant case the statements and conclusions of fact upon which the conclusion in the opinion is premised are in conflict with specific findings of fact by the Master and the District Court. The Court of Appeals in reversing these findings makes no attempt to show that the findings of fact by the Master and the District Court are clearly erroneous.

We respectfully submit that, for this reason also, a petition for certiorari should be granted.

Rules of Civil Procedure for the Districts of the United States, Rule No. 53, Masters. — (e) Report — (2).

General Order 47, 11 U. S. C. A. 115, following Section 53.

Morris Plan Industrial Bank v. *Henderson*, 2 Cir., 131 F. 2d 975, 976.

All questions presented on this petition were fully explored before the Master and the District Court and there decided in favor of the petitioner by specific findings of fact and conclusions of law. The decision of the Court of Appeals, which is sought to be reviewed, is based upon the merits of the issues presented by this petition.

The statutory requirements of the Municipal Bankruptcy Act, section 83 (e), have been fully complied with by the petitioner, and the Master and the District Court so found. The issues presented by the defenses of the dissenting creditors have been determined only after full trial upon all questions of fact as well as after full argument upon all questions of fact and of law; and full findings of fact on all issues made and conclusions of law have been made by the District Court in favor of the petitioner and against the dissenting creditors, respondents here.

Aside from the novelty and importance of the issues presented, the decision of the lower court should be reviewed for the additional reason, we submit, that it is clearly erroneous and not in accord with the principles of applicable decisions of this Court.

To the extent that the decision below denies to the petitioner the benefits of section 83 (j) of the Municipal Bankruptcy Act it is not in accord with the following decisions:

Ouerbacker v. *Henderson County, supra;*

Wells Fargo Bank & Union T. Co. v. *Imperial Irr. Dist., et al., supra;*

Thomas v. *El Dorado Irr. Dist.*, 9 Cir., 126 F. 2d 922; certiorari denied, 317 U. S. 660, 87 L. Ed. 42, 63 S. C. 59;

Taylor v. *Provident Irr. Dist.*, 9 Cir., 123 F. 2d 965; certiorari denied, 315 U. S. 821, 86 L. Ed. 1217, 62 S. C. 914.

In so far as the decision below charges the petitioner and the consenting creditors with lack of good faith in the presentation of its original petition it is not in accord with the following decisions:

Kaufman County Levee Imp. Dist. No. 4 v. *Mitchell*, 5 Cir., 116 F. (2d) 959;

American United Mutual Life Ins. Co. v. *City of Avon Park*, 311 U. S. 138, 61 S. C. 157, 85 L. Ed. 91;

Town of Belleair, Fla. v. *Groves*, 5 Cir., 132 F. (2d) 542; Certiorari denied, —U. S. —, 87 L. Ed. 623, 63 S. C. 762;

Snyder v. *Fenner*, 3 Cir., 101 F. (2d) 736;

Tenn. Pub. Co. v. *American Nat. Bank of Nashville, Tenn.*, 290 U. S. 18, 81 L. Ed. 13, — S. C. —;

Getz v. *Edinburg C. I. School Dist.*, 5 Cir., 101 F. (2d) 734;

West Coast Life Ins. Co. v. *Merced Irr. Dist.*, 114 F. (2d) 654; Certiorari denied, 311 U. S. 718, 85 L. Ed. 467, 61 S. C. 441;

Fano v. *Newport Heights Irr. Dist.*, 9 Cir., 114 F. (2d) 563.

The Court of Appeals in its decision arbitrarily reversed the Master and the District Court in their specific findings of fact, which findings by the trial court are amply supported by the record.

An authoritative decision by this Court of the questions presented is also of pressing importance and interest to investors in municipal securities, in order that those who

are willing to make a voluntary refunding of their indebtedness may know whether the creditor municipality will have the full protection and benefit of the Municipal Bankruptcy Act in its dealings with recalcitrant minority bondholders for the purpose of accomplishing the 100% completion of the refunding.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and proceedings in the case of *Ed. C. Wright, doing business, etc., et al.*, v. *City of Coral Gables, Florida*, No. 10605, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed by this Honorable Court and that the interlocutory decree of the United States District Court in and for the Southern District of Florida, Miami Division, be affirmed, and for such other and further relief in the premises as to this Honorable Court may seem meet and just.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Factual Background of the Case.

The City of Coral Gables was incorporated in 1925 and reincorporated in 1929 with a substantially revised charter, which included in the City boundaries approximately 14½ square miles of land area immediately adjoining and to the West and South of the City of Miami, a major portion of which still is unimproved land (R. 1643).

The first subdivisions of what is now known as the City of Coral Gables were opened in 1921, and building was com-

menced in 1922 before the city was incorporated. The 1930 Federal Census showed a permanent population of 5,697, the State Census of 1935 showed 6,747, and the Federal Census of 1940 showed 8,294 (R. 1436). Winter population has never been exactly determined, but it is estimated from 13,000 to 14,000 (R. 1644).

The City of Coral Gables is principally a residential adjunct of the City of Miami and is one of many such residential sections in the metropolitan Miami area (R. 1643, Deft. Ex. 57).

Based upon exaggerated boom-time values, Coral Gables real estate was assessed in 1926 at a value of $90,810,350.00, which was then assumed to be one-half the fair value of the land alone, with no assessment of improvements upon the land. On this predicate and on the expectation of phenomenal growth during 1925, 1926 and 1927, bonds were issued and other obligations incurred to the approximate total amount of $8,750,000.00. The collapse of the real estate boom and the subsequent sharp decline in realty values and tax collectibility placed the City in complete default by the end of 1930. Default continued as to both principal and interest, except for small partial payments on interest and the retirement of a few obligations by purchase, until the total indebtedness, including past due interest, rose to the sum of $11,182,606.36 as of January 1, 1937 (R. 1647-8).

The total assessed value of all property in the City subject to taxation on the tax roll for 1937 was $23,684,018.00 (R. 1650).

Shortly after the default in 1930, the Coral Gables Bondholders Protective Committee, known as the Barker Committee, was organized to represent holders of its defaulted obligations in dealing with the City. This committee and the City, during these seven years, worked on several plans for adjustment but were unable to consummate any of these

plans. Prior to the year 1936 there had been only a few suits against the City on its defaulted bonded obligations, one of these by the Committee on over two million dollars of defaulted obligations. In 1936 eleven suits were instituted against the City on its defaulted obligations; in 1937 five more suits were filed against the City on its defaulted bond obligations, and one was filed in 1938 (R. 1422-5).

The efforts of city officials to negotiate a refunding through the Committee, representing bondholders, were virtually at a standstill in 1936, when the City employed Carl L. V. Exselsen as the exclusive representative of the City to negotiate a debt refunding plan in conjunction with the mayor and city commissioners (R. 1519).

These negotiations resulted in the adoption of Ordinance No. 269 on December 23, 1936 (R. 57).

This plan was negotiated with the said Committee and other representatives of larger groups of bondholders. On February 3, 1937, the Committee signed a contract with the City to refund obligations controlled by it (R. 1477). The holders of a substantial amount of outstanding debts signed contracts, dated December 24, 1936, for their refunding under the plan for readjustment (R. 1482).

Under these contracts and the plan of adjustment, the City was required to procure a decree of the Supreme Court of the State of Florida validating the refunding securities proposed to be issued. The validation proceeding was not concluded in the Supreme Court until July 30, 1937, and it required an amendment to the plan to make it conform to this decision. *City of Coral Gables* v. *State of Florida*, 128 Fla. 874, 176 So. 40. This amendment to the plan was made by Ordinance No. 289, adopted September 4, 1937 (R. 96). The changes in the plan by this amendment do not affect any of the questions presented in this petition.

In September, 1937, the City had contracts providing for the voluntary refunding of over 90% of its indebtedness

affected by the plan, which obligated the creditors to accept immediate refunding of their bonds when 90% or over of the indebtedness was available for refunding. These contracts, however, did not obligate the creditors to submit the plan of voluntary adjustment to the bankruptcy court as a plan of composition (R. 1477, 1482). The contracts did not mention bankruptcy as there was no Municipal Bankruptcy Act at the time they were executed.

The City Commission of Coral Gables decided to proceed with the voluntary plan of adjustment, and in the latter part of September, 1937, and shortly thereafter, actually exchanged approximately 90% of its outstanding indebtedness under the plan. The Committee then controlled less than 50% of the outstanding debts of the City (R. 676, 1430).

The resources of the City pledged under the plan to the servicing of the refunding securities are the minimum debt service millage required in section 8 of the ordinance (R. 72), from the proceeds of which would be set up the Issue of January 1, 1937 Fund, the Sinking Fund (R. 74), and the Tax Participation Certificate Fund (R. 78). The City also pledged itself to use under certain conditions the proceeds from the liquidation of delinquent tax assets held by the City for taxes levied prior to January 1, 1936, as provided for in section 12 of the plan. The City, under the plan, is also obligated to levy debt service taxes in excess of the minimum millage prescribed, if necessary, for the purpose of servicing the refunding bonds, and it is obligated, in the event it does not carry out the special ten-year program for retirement of refunding bonds, to levy a special tax to raise funds for the purpose of carrying out this retirement schedule.

The complaints by respondents, appellants below, on their appeal arose largely out of the operations of the City under section 12 of Ordinance 269 (R. 57, 87). In section 12 it is provided that the creditors of the City waive and relinquish all of their rights to participate in the proceeds of delin-

quent tax assets of the City covering "any and all claims representing delinquent taxes and/or special assessments imposed prior to January 1, 1936 and/or Tax Certificates, Tax Deeds or other assets now or hereafter derived" (R. 87) from such taxes. The City assumed the obligation to liquidate these delinquent tax assets.

The City sold all of these delinquent tax assets and received payment in cash for the same in October, 1937. The City also sold to the same party at par its delinquent tax liens for taxes levied in 1936. It is the use of these funds in the financial operations of the City that was complained of by the respondents in the District Court and in the Circuit Court. In purchasing unrefunded obligations, Exselsen acted only as negotiating agent, and did not spend the money as he saw fit (R. 1470).

The moneys used by the City in the purchase of the judgments and the old bonds and coupons did not come out of any of the funds set aside for the servicing of the refunding securities (R. 326, 1521-9).

In October, 1937, five of the suits against the City on defaulted bonds and coupons had progressed to final judgment, and peremptory writs of mandamus required special earmarked tax levies to service the same. These judgments and the millage required to service them in the year 1937 were as follows (R. 42-50, 1521, 1522, 1530):

Judgment Creditor	Amount of Judgment	Millage Required in 1937
Augustus T. Ashton	$ 13,771.35	.1515
Fiduciary Counsel, Inc.	130,885.14	1.0184
W. J. Noel	19,365.66	.2287
Leo K. Steiner	14,879.51	.2976
Henry A. Thies	54,802.59	.5838
Totals	$233,704.25	2.2800

The above is a detailed statement of judgments outstanding, but at the same time there were a large number of past due bonds outstanding, and matured coupons, in the hands of creditors pressing for payment.

There were also then pending suits by Lois Harmon and C. J. Root, which went to judgment and peremptory writs of mandamus requiring special earmarked tax levies in the year 1938 of .0429 to service the Harmon judgment and .3521 to service the Root judgment (R. 1530). In 1939 G. E. Vallette obtained a judgment and peremptory writ of mandamus, which required the levy in the year 1939 of a special earmarked tax levy of .08639 mills (R. 1530).

The peremptory writs issued by the court on the five judgments in 1937 required the City to pay these judgments in full over a period of six years, and the millages listed above were the several millages required to pay the first year's installment on these judgments.

By calculations from defendant's Exhibit 8 (R. 1521), judgments without peremptory writs in 1937 and old bonds which matured on and before July 1, 1938, plus coupons and interest to January 1, 1937, were purchased by the City in the total amount of $261,827.98. Judgments on these claims would have exceeded this amount because they would have included interest after January 1, 1937, to the date of the several judgments. To service these judgments over a period of six years would have required a tax levy in 1938 of approximately 3 mills.

The earmarked special tax levy made pursuant to existing peremptory writs of mandamus in 1938 was 1.34 mills (R. 1530).

After fixing the millage in 1937, the City made an agreement with Fiduciary Counsel, Inc., under which it paid $8,000.00 in cash on the judgment and modified the writ of mandamus to service the judgment over a period of twelve years and to reduce the interest to be paid upon the same.

This enabled the City to reduce the earmarked special tax levy for this judgment creditor to .7098 mills. The City also purchased the Leo K. Steiner judgment and the Henry A. Thies judgment, and did not actually have to make the special earmarked levy to service these two judgments (R. 1530). These three settlements enabled the City to reduce the earmarked tax levy millage in 1937 by 1.59 mills (R. 1530).

If the City had not used the proceeds from the liquidation of its delinquent tax assets for the years prior to 1936, which were not pledged as security for the refunding securities, in purchasing the above mentioned judgments and in purchasing the old matured bonds and coupons during the period from October 18, 1937 to May 13, 1938, it would have been faced with the almost certain requirement of levying special earmarked tax levies in the year 1938 in the amount of 4.59 mills in addition to the 1.34 mills which was actually levied in that year.

The petitioner, City of Coral Gables, used funds which were not pledged to the servicing of the refunding securities to acquire for the account of its Sinking Fund and other trust accounts, obligations against it which, if placed in judgment, along with those that were already in judgment, would have required an increase of its debt service taxes for the year 1938 of approximately 100%.

The purchase of these judgments and outstanding obligations was for the benefit of the City and its taxpayers and for the benefit of all of its creditors, in that the purchases resulted in saving to the City and its creditors the benefits of the partial voluntary refunding.

In regard to the above tranactions of the City in purchasing old bonds and coupons and judgments on old bonds and coupons and refunding bonds, the Special Master specifically held that such transactions did not constitute an abandonment of the plan of refunding and that they were

a bona fide effort on the part of the City to accomplish a 100% completion of its refunding plan (R. 325-8).

These factual findings by the Master were specifically approved by the District Court (R. 1776-7).

On and prior to March 22, 1939, the City had also purchased some of its refunding bonds, with a part of the proceeds from the delinquent tax assets above described, with general funds and with trust funds (R. 1521, 1529). The old obligations purchased with such funds were converted into refunding bonds and tax participation certificates.

On June 27, 1940, the City had cancelled $144,198.98 (R. 1641) of refunding bonds to comply with section 12 of the plan, and it still held $330,000.00 of refunding bonds for the purpose of meeting the future cancellation requirements of said section. On June 30, 1941, it cancelled an additional $50,818.00 of refunding bonds (R. 1641).

Since the institution of this proceeding the City has exchanged with two additional creditors old bonds and coupons for refunding securities of the aggregate face value of $6,830.00. These exchanges were made in August and November of 1940 (R. 1469).

The City has, since the year 1937, levied debt service taxes according to the requirements of the plan (R. 1607, 1613, 1618). The Master found, and the District Court affirmed his finding that these tax levies complied with the requirements of section 8 of the plan (R. 326, 328, 1773).

The City is holding in a special cash reserve moneys derived from the levy of the debt service taxes required under the plan, in the amount of $19,724.94 for interest accrued since January 1, 1937, on all refunding bonds authorized to be issued on all outstanding old bonds not heretofore placed in judgment, and in the amount of $2,794.91 for certificate reduction payments on all tax participation certificates authorized to be issued on such old bonds and coupons (R. 1655).

Argument.

In arguing the questions presented we have consolidated them into four divisions for the sake of conciseness and brevity.

II. The Court of Appeals Misinterpreted the purpose of Section 83(j) of the Municipal Bankruptcy Act and the Effect Which Should Be Given to It in the Instant Case.

The decision of the Court of Appeals in the instant case in effect interprets section 83 (j) to mean that, the holder of a refunding security, voluntarily accepted, cannot consent to a plan of composition offered in a bankruptcy proceeding unless his refunding security was issued under a plan of refunding identical with the plan of composition offered in the petition in bankruptcy.

The decision of the Court of Appeals in the instant case also in effect holds that, section 83 (j) is not applicable and cannot be availed of by a city, without regard to other provisions of the Bankruptcy Act, although at the time the petition was filed the original debts of the city affected by the plan of composition submitted in the petition were in four categories, (a) some of the debts had been refunded voluntarily by creditors and the old obligations exchanged for refunding securities, (b) some of the old obligations changed into the form of refunding securities and refunding bonds, were owned, held and controlled by the city, (c) some of the old debts were still in the original form of bonds and coupons, and (d) some of the old debts were in the form of judgments on original bonds and coupons, with peremptory writs of mandamus to compel their payment in full by special earmarked tax levies spread over several years.

The Court of Appeals in its decision in the instant case limits the effect of section 83 (j) so as to deny the city the benefits of the Municipal Bankruptcy Act because of alleged "changed conditions" existing at the time of filing the petition without stating whether such "changed conditions" result in any preferential advantage to the consenting creditors as compared to the dissenting creditors.

The opinion of the Court of Appeals in the instant case interprets section 83 (j) to mean that the holder of a refunding security, voluntarily accepted under a plan of refunding, cannot consent to a new plan of composition offered in a bankruptcy proceeding for the purpose of refunding all the obligations of the city, some of which had been refunded under a prior voluntary plan and some of which had not been refunded under such voluntary plan.

The purpose of section 83 (j), 11 U. S. C. A. 403 (j), is to permit a creditor of a taxing agency, who has irrevocably consented to a plan of refunding by exchanging his old securities for refunding securities, to be classified with holders of old unrefunded securities and to vote his consent in a bankruptcy proceeding offering a plan of composition of all of the debts of the taxing agency, refunded and unrefunded, whether or not the plan of composition offered in the bankruptcy proceeding is identical with the plan of refunding theretofore accepted by such holder of refunding securities.

American National Bank of Nashville, Tennessee v. *City of Sanford, Florida*, 5 Cir., 112 F. 2d 435; Certiorari denied, 311 U. S. 677, 85 L. Ed. 436, 61 S. C. 45;

Ouerbacker v. *Henderson County*, 4 Cir., 126 F. 2d 309; Certiorari denied, 317 U. S. 654, 87 L. Ed. 40, 63 S. C. 51;

Wells Fargo Bank & Union T. Co. v. *Imperial Irr. Dist.* (April 28, 1943) 9 Cir., 136 F. 2d 539.

So long as any of the debts of a taxing agency affected by a plan of refunding are outstanding (that is not "owned, held or controlled" by the city) and not refunded, such an agency may under section 83 (j) file a petition in bankruptcy for confirmation of a plan of composition of all of its debts and its creditors, who have accepted refunding securities under any prior voluntary plan of refunding, belong in the same class with the creditors holding unrefunded securities, and such holders of refunding securities may vote and consent to the plan of composition, whether or not the plan of composition is identical with the plan of refunding theretofore accepted by the holders of refunding securities, provided such consenting creditors, upon the confirmation of the plan of composition, will receive no advantage and no preference over objecting creditors as a result of the confirmation of the plan.

Querbacker v. *Henderson County, supra.*
Wells Fargo Bank & Union T. Co. v. *Imperial Irr. Dist., supra.*

The purpose of section 83 (j) is defeated if it is interpreted to mean that the only change in a creditor's status which will be disregarded in a proceeding in bankruptcy for the confirmation of a plan of composition is one resulting from his consent to and exchange of securities under the very plan of composition before the court.

Wells Fargo Bank & Union T. Co. v. *Imperial Irr. Dist., supra.*

The test of whether a city may proceed under section 83 (j) is whether consenting creditors who hold refunding securities have received or will receive as a result of the confirmation of the plan an advantage or preference over the objecting creditors, which advantage or preference offers an inducement to the consenting creditors to file their consents

for the purpose of forcing the objecting creditors to take less than the consenting creditors have received or may receive. It is immaterial whether the consenting creditor is the holder of an obligation of the city in its original form or the holder of refunding securities voluntarily accepted by the creditor in exchange for original obligations.

American United Mutual Life Ins. Co. v. *City of Avon Park*, 311 U. S. 138, 61 S. C. 157, 85 L. Ed. 91;

Kaufman County Levee Imp. Dist. No. 4 v. *Mitchell*, 5 Cir., 116 F. 2d 959;

Town of Belleair, Fla. v. *Grover*, 5 Cir. 132 F. 2d 542; Certiorari denied, 87 L. Ed. 623, 63 S. C. 762.

Special treatment by a city of some of its former creditors or treatment different from that offered in a plan of composition under which it acquires ownership or control of some of its debts affected by the plan more than a year prior to filing a petition in bankruptcy is objectionable and vitiates the plan only when such treatment results in depleting the assets available for other creditors and when it results in allowing the consenting creditors who file acceptances to the plan to receive, as a result of the confirmation thereof, a preference over and above that which the dissenting creditors will receive under the plan.

American United Mutual Life Ins. Co. v. *City of Avon Park, supra;*

Evergreen Farms Co. v. *Willacy Co. Water Control Imp. Dist.*, 5 Cir., 124 F 2d 1;

and other cases cited above.

So long as a present creditor of the city has received no special benefit as a result of the city's acquiring ownership and control of some of its debts or the payment and retirement of some of its debts more than a year prior to the filing of a petition in bankruptcy, and so long as such ac-

quisition or payment does not deplete the assets of the city pledged to the refunding securities, the bankruptcy act places on a basis of equality all existing creditors whose claims are payable from the same source and does not concern itself with obligations or debts of the city originally contemplated to be affected by the plan but not existing and outstanding at the time of the filing of the petition.

Taylor v. *Provident Irr. Dist.*, 9 Cir., 123 F. 2d 965; Certiorari denied, 315 U. S. 821, 86 L. Ed. 1217, 62 S. C. 914;

Thomas v. *El Dorado Irr. Dist.*, 9 Cir., 126 F. 2d 922; Certiorari denied, 317 U. S. 660, 87 L. Ed. 42, 63 S. C. 59.

We respectfully submit that the opinion of the lower court in the instant case misinterprets section 83 (j) of the Municipal Bankruptcy Act in the above respects and that its interpretation and application of said section in this case is not in accord with the above cited decisions.

III. The Plan of Composition Was Offered and Accepted in Good Faith.

The Municipal Bankruptcy Act, section 83 (e), 11 U. S. C. A. 403 (e), provides that the judge shall make written findings of fact and his conclusions of law and shall enter an interlocutory decree confirming the plan, if satisfied that "(5) the offer of the plan and its acceptance are in good faith." Section 82, however, on definitions, does not prescribe what constitutes good faith, on the part of either the petitioner, or those accepting the plan.

The Circuit Court of Appeals, in its decision, takes the novel position that the City (petitioner), by requesting the holders of its refunding securities to consent, first to the filing of the petition, and later to the confirmation of the plan, and the creditors, by so consenting, were not acting

in good faith—legal good faith so the opinion says—and that this action, by both city and bondholder, was for the purpose of "bludgeoning into submission" the non-consenting creditors.

Such a holding, undisturbed, on the part of the Circuit Court of Appeals, so circumscribes and limits the activities of the taxing unit to solicit consents, as to becloud and make uncertain future efforts of taxing agencies seeking to complete a refunding previously partially completed.

In the municipal bankruptcy cases previously decided, where the question of good faith has arisen, there has been no such holding by either the district or circuit courts. In these decided cases, the element of fact that has prevented the courts from approving the plans has been that the city, by contract or otherwise, affords to the consenting creditors a more advantageous position than that accorded the non-consenting creditors.

Kaufman County Levee Imp. Dist. No. 4 v. *Mitchell*, 5 Cir., 116 F. (2d) 959;

American United Mutual Life Ins. Co. v. *City of Avon Park*, 311 U. S. 138, 61 S. C. 157, 85 L. Ed. 91;

Town of Belleair, Fla. v. *Groves*, 5 Cir., 132 F. (2d) 542; Certiorari denied, 87 L. Ed. 623, 63 S. C. 762.

Good faith in filing a petition imports an honest intention on the part of the petitioner to effect a refunding of its financial affairs together with a need for and a possibility of effecting it. These elements are not lacking in the instant case.

Snyder v. *Fenner*, 3 Cir., 101 F. 2d 736;

Tenn. Pub. Co. v. *American Nat. Bank of Nashville, Tenn.*, 290 U. S. 18, 81 L. Ed. 13, — S. C. —.

Charges of bad faith were interposed as defenses in numerous cases where the derelictions of the petitioner were more flagrant and irregular than in the instant case.

Getz v. *Edinburg C. I. School Dist.*, 5 Cir., 101 F. (2d) 734;

West Coast Life Ins. Co. v. *Merced Irr. Dist.*, 114 F. (2d) 654; Certiorari denied, 311 U. S. 718, 85 L. Ed. 467, 61 S. C. 441;

Fano v. *Newport Heights Irr. Dist.*, 9 Cir., 114 F. (2d) 563.

The Circuit Court of Appeals condemns the petitioner for its persistent correspondence with its creditors (R. 1863, 1868). The record discloses that the outstanding bonded indebtedness of the City of Coral Gables ran into millions of dollars and that the number of its creditors ran into hundreds, and that they were scattered from coast to coast. Careful examination and consideration of the two letters complained of (R. 1573-1601, Deft. Ex. 21) does not warrant the condemnatory expression of the Court that the City and its creditors were "bludgeoning into submission" the non-consenting creditors.

The respondent Wright (recalcitrant and non-cooperative bondholder) purchased his bonds after the plan had been approved by and exchanges carried out with 90% of the creditors, well knowing the terms of the plan of composition, and aware of the existence of the Municipal Bankruptcy Act (R. 1276-7, 1383-4, 1631-4).

The Master in his findings (R. 325), and the District Judge in his order (R. 1773) found no such wrong-doing on the part of the City, but they did find that the City for many years had been endeavoring to extricate itself from the financial chaos brought about by the Florida boom and its inability to meet its obligations as they matured. Since proceedings in bankruptcy are ruled by equitable considerations, the Circuit Court of Appeals evidently overlooked its own indictment of the respondents, charging them, for

the second time, with creating artificial defenses to defeat the confirmation of the plan.

Roberts v. *Board of Public Instruction of Broward Co., Fla.*, 5 Cir., 117 F. 2d 943; Certiorari denied, 313 U. S. 582, 85 L. Ed. 1539, 61 S. C. 1101.

It is to be noted that, as far as the ownership of the securities resisting the plan are concerned, Wright was the Bank and the Bank was Wright, and that Wright, the real owner, is entitled to no more consideration than the Bank.

The Court entirely overlooked and ignored the evidence in the record of the other activities and efforts of Wright and the Bank in trying to force the petitioner to deal with them on their terms, better and greater than those accorded the consenting creditors who had already exchanged.

The record discloses negotiations by Wright with the City up to the very day of the filing of the petition (R. 1284); that the Bank, on the coupons separately held by it as pledgee, sought to prevent the City from paying its interest on the refunded bonds by procuring an alternative writ of mandamus on December 20, 1939 (R. 1437); that Wright sought to have executed a contract to negotiate (no terms being agreed upon), the expiration date of which extended beyond the effective date of the then existing municipal bankruptcy act (R. 1091-5, 1631-4); Wright was a party to a gentlemen's agreement that he would assist the City in its refunding efforts (R. 1276-7). All of which conduct by Wright and the Bank shows that the respondents, appellants below, have brought themselves clearly within the class referred to many times in the decisions of the district courts and the circuit courts of appeals as a recalcitrant minority which has at all times sought to obstruct the plan and which apparently would not be satisfied with any plan which would not offer them one hundred cents on the dollar, plus interest.

Querbacker v. *Henderson County*, 4 Cir., 126 F. (2d) 309; Certiorari denied, 317 U. S. 654, 87 L. Ed. 40, 63 S. C. 51;

Thomas v. *El Dorado Irr. Dist.*, 9 Cir., 126 F. (2d) 922: Certiorari denied, 317 U. S. 660, 87 L. Ed. 42, 63 S. C. 59;

Kelly v. *Everglades Drainage Dist.*, 5 Cir., 132 F. (2d) 742;

Roberts v. *Board of Public Instruction of Broward Co., Fla., supra.*

Here, for the first time, we have objecting creditors resisting and opposing the plan from its inception, having participated in certain so-called evils of which they complain, being given complete relief and being permitted to reap an unjust enrichment at the expense of the more than 90% of the creditors of the same class who have voluntarily accepted the plan.

Creditors who have purchased defaulted bonds during the progress of a refunding program for speculative purposes are not looked upon with favor; neither do they come into equity with clean hands.

Security-First National Bank v. *Rindge*, 85 F. (2d) 557, 86 F. (2d) 3; Certiorari denied, 57 S. C. 315, 107 A. L. R. 1249.

If this record shows a lack of good faith on the part of anyone, it is on the part of respondents Wright and the Bank, and not the City and the consenting creditors.

IV. There Is No Lack of Identity of Interests of Those Consenting in the Instant Case With Those Compelled by their Consents to Accept the Plan.

a. There is no Lack of Identity of Interest.

There are two elements of identity of interest between consenting and non-consenting creditors, 1st, the source

from which they receive something of value for their old obligations, and 2nd, the amount which they receive. In the instant case the source is the same, to wit, the proceeds from future debt service taxes levied according to the requirements of the plan, and the amount which they will receive is the same.

In the instant case the creditors holding refunding securities, who have consented to the confirmation of the plan of composition, have received only the refunding bonds and tax participation certificates in amounts authorized under the plan to be issued to all creditors holding obligations affected by the plan. They have each received refunding bonds in the amount of 50% of the face of their old bonds, and tax participation certificates in the amount of 50% of the face amount of their old bonds plus interest thereon accrued to January 1, 1937. The holders of the refunding bonds and the tax participation certificates, who have consented to the confirmation of the plan, have also received as they accrued the interest payments due on the refunding bonds, and liquidation dividends on their tax participation certificates in the amount of their pro rata share of the Tax Participation Certificate Fund.

The objecting creditors will, upon the confirmation of the plan, receive refunding bonds and tax participation certificates in the same relative amount as those received by the consenting creditors. They will also receive, upon exchange of their old obligations for such refunding securities, all interest on refunding bonds accrued to the date of the exchange, and all liquidation dividends on certificates accrued to the date of exchange in the same proportionate amount as has been paid to the consenting creditors during the years the plan has been in effect (R. 1829, 1833). Their refunding bonds and tax participation certificates will entitle them to the identical payments of interest and pro rata payments of liquidation dividends in the future as

those to which the consenting creditors will be entitled. The City has in special reserves moneys for the payment of all accrued interest and liquidation dividends now due on all refunding bonds and tax participation certificates authorized to be issued to non-consenting creditors (R. 1643, 1655, Deft. Ex. 57).

The fact that consenting creditors have received, as they accrued, interest payments on their refunding bonds and liquidation dividend payments on their certificates sooner than the dissenting creditors will receive such payments, does not constitute an unfairness or lack of mutuality of interest between the consenting and dissenting creditors.

Wells Fargo Bank & Union T. Co. v. *Imperial Irr. Dist.*, (April 28, 1943), 9 Cir., 136 F. (2d) 539, 552 (15).

Respondent Wright is in a different situation from consenting creditors in another respect which does not entitle him to complain of the confirmation of the plan of composition on the ground of the lack of identity of interest between consenting and non-consenting creditors. Wright sold some of his old bonds to the City and none of the consenting creditors did so. On November 11, 1938 Wright held $41,000 par value of past due old bonds of the City, upon which interest was due in the amount of $12,780 as of January 1, 1937, and approximately $16,639 as of November 10, 1938. He sold these bonds and coupons to the City for $26,240 cash, which is 64% of the face amount of the bonds, or 46.99% of their face amount plus interest accrued to January 1, 1937 (R. 1523-4). Other smaller blocks of old bonds, most of them past due but some with future maturities, were purchased by the City with funds not pledged to the servicing of the refunding securities, about the same time, at prices ranging from 37% to 60% of the principal amount of the old bonds. These purchases were made by the City between October 18, 1937 and December 15, 1938

(R. 1521-8). It was these purchases of old bonds by the City which the respondent Wright contended in the lower court were preferential, discriminatory treatment of some of the former creditors of the City. Having himself participated in this special treatment of some former creditors by the City and having received more for his old bonds than any of the other former creditors received, he cannot now complain. It is not contended, and the record does not show, that any of the consenting creditors sold any bonds, coupons or judgments to the City.

In so far as the abnegations and sacrifices required of consenting creditors and respondent Wright and other non-consenting creditors are concerned, the only difference is that the consenting creditors voluntarily accepted the "abnegations and sacrifices of which all would share" at the time they exchanged their old bonds and coupons for refunding securities, and Wright and other non-consenting creditors, by their refusal to exchange, have deferred the date of their "abnegation and sacrifice". The abnegations and sacrifices of each class of creditors are the same. The purpose of section 83 (j) is to authorize a proceeding in bankruptcy to coerce all creditors to accept the plan of composition regardless of the interval between the time when those voluntarily accepting the refunding took their sacrifices and the time when the non-consenting creditors will be required under the bankruptcy law to take their sacrifices.

The only distinction in point of fact on the question of identity of interest of those consenting with those compelled by their consents to accept the plan between the *City of Sanford* case and in the instant case is the element of time.

American National Bank of Nashville, Tennessee v. *City of Sanford, Florida*, 5 Cir., 112 F. (2d) 435;

Certiorari denied, 311 U. S. 677, 85 L. Ed. 436, 61 S. C. 45.

b. "Changed Conditions" Do Not Alter Identity of Interest of Consenting and Non-Consenting Creditors.

The "changed conditions" between the time of placing the voluntary plan of refunding in effect, September, 1937, and the time of filing the petition in this cause, June, 1940, affected the interests of all creditors alike, whether they are holders of refunding securities or holders of old bonds and coupons and judgments on old bonds and coupons.

Immediately after the voluntary refunding of approximately 90% in amount of the debts of the City there was undoubtedly an identity of interest of the creditors who had accepted refunding securities with that of the creditors who declined to refund their bonds, as was held in the case of *American National Bank of Nashville, Tennessee* v. *City of Sanford, Florida, supra.*

The "changed conditions", all of which were made possible by the cooperation of the creditors who voluntarily accepted refunding securities and agreed to the abnegations and sacrifices required under the plan, are the following:

(1) The City sold on October 10, 1937, as was contemplated under section 12 of Ordinance No. 269, for a cash consideration, accrued delinquent tax assets which were not pledged to the servicing of the refunding securities (R. 87-8);

(2) With the proceeds of the sale of said tax assets and other funds not appropriated and pledged to the servicing of the refunding securities, the City acquired, owned, held and controlled old bonds and coupons and judgments on old bonds and coupons and refunding bonds in the following amounts in terms of refunding securities, to wit, $474,198.98

of refunding bonds and $234,746.92 of tax participation certificates (R. 4, 5);

(3) The City, from the refunding bonds so acquired, had retired and cancelled, on June 30, 1940, $144,064.58 of refunding bonds, as required under section 12 of said ordinance, and held the other refunding bonds for future retirement, according to the schedule in said section of the plan (R. 1641, 1648);

(4) The City reduced the amount of its indebtedness affected by the plan by the payment of some of it from the proceeds of special earmarked tax levies made pursuant to the requirement of existing peremptory writs of mandamus issued out of the District Court of the United States (R. 1628, Deft. Ex. 29);

(5) Improvements in homes and other buildings had been made in the City which increased the total assessed valuation to amounts above those anticipated by the City when it worked out its plan of refunding, but the said growth was still far short of sufficient to reasonably anticipate the payment of the tax participation certificates in full (R. 1651);

(6) Tax collections had improved and the amount of money paid into the tax participation certificate fund and disbursed on a pro rata basis to the outstanding certificate holders and held for certificates authorized to be issued was in excess of the amounts anticipated at the time the plan was placed in effect (R. 1653-4);

(7) The City, through its purchase of judgments upon which peremptory writs of mandamus existed, had reduced the amount of special earmarked debt service taxes required of it under peremptory writs of mandamus of the District Court of the United States (R. 1530);

(8) The City had, by reducing its operation tax levy, maintained a total tax rate of 22 mills for debt serivce and operations, despite the fact that debt service tax levies required under the plan and under peremptory writs of mandamus were in excess of the total tax levy anticipated to be required for the servicing of the full amount of refunding securities authorized to be issued under the plan (R. 1530);

(9) While the record does not show whether consenting creditors were the individuals who exchanged their old bonds, it is a fair inference that the holders of the refunding bonds and tax participation certificates, who consented in the bankruptcy proceeding, were in the main the same individuals who held the old bonds and voluntarily exchanged them for refunding securities;

(10) The market value of the refunding bonds had risen from 45½ cents on the dollar in October 1937 (R. 1640) to 66 cents on the dollar in March 1939 (R. 1528), and higher in June 1940;

(11) The City had on hand cash to pay accrued interest and accrued liquidation dividends on all refunding bonds and tax participation certificates authorized to be issued to the holders of unrefunded bonds and coupons (R. 1655).

The above listed "changed conditions" all affect the interests of the consenting creditors in the same manner and degree as they affect the interests of the non-consenting creditors, and do not destroy the requisite identity of interest.

c. Opinion Should Be Clarified.

The language of the lower court (R. 1867) when it said, "We did not, we could not, hold that where, as here, a plan has been entirely completed and it is sought to revive it under changed conditions for the sole purpose of forcibly

scaling the debts of nonassenting creditors, the consents of persons holding refunding securities issued under that plan could be solicited and counted as effective consents under Subdivision (j)." has left the procedure under subdivision (j) in a rather confused state as far as future action on the part of taxing agencies is concerned in not stating clearly (a) when a plan has been entirely completed, and (b) what "changed conditions" should prevent the solicitation of consents by a city and the use of subdivision (j).

If the "changed conditions" destroyed the identity of interests of consenting and non-consenting creditors, then section 83 (j) might not be available to a city. But where, as in the instant case, it does not destroy such identity of interest, then section 83 (j) should be available to a city for its protection.

If for no other reason, this petition should be granted to allay all doubts on these two points, and the opinion of the lower court should be reversed because it is premised on this false assumption of fact that in this case there is a lack of identity of interest of those consenting with those compelled by their consents to accept the plan.

V. The Circuit Court of Appeals in Its Decision Arbitrarily Reversed the Master and the District Court in Their Specific Findings of Fact, Which Findings by the Trial Court Are Amply Supported by the Record.

Specific findings of fact by a special master and the district judge should not be reversed by the appellate court unless such findings are clearly erroneous.

Rule 53 (e) (2), Rules of Civil Procedure for the District Courts of the United States.

General Order 47, 11 U. S. C. A. 115, following section 53.

The Circuit Court of Appeals, in reversing the lower court, based its premise on the finding that the voluntary plan was a completed plan, abandoned by the City long prior to the filing of the proceedings in bankruptcy, but the evidence overwhelmingly supports the position of the City and the findings of the Master and the District Judge, that the plan was still open and was not a fully completed or abandoned one.

This error is so clearly pointed out by Mr. Justice Waller, that we quote his conclusions:

> "Waller, Circuit Judge, concurring in part and dissenting in part:
>
> • • • • • • •
>
> "The Special Master and the Court below found as a fact that the plan of composition of debts had not been completed when ninety-odd per cent of the bondholders had accepted refunding bonds. I concur." (R. 1867).
>
> • • • • • • •
>
> "If the plan was completed in 1937 the Court would be without jurisdiction, otherwise the plan might yet be amended. It seems important, therefore, that the Court should carefully examine, or re-examine, its findings that the plan was fully completed rather than partially completed.
>
> "The following considerations seem to sustain the conclusion that the plan was not a fully completed one, or an abandoned one, in 1937, or at any time prior to the filing of the petition herein:
>
> "1. Only ninety-odd percent of the bonds were refunded in 1937 and the refunding plan would seem not to have been completed.
>
> "2. Negotiations by the City, through Exselsen and others, continued without cessation to the date of the filing of the petition. (Negotiations between the City

and Mr. Wright were in progress up to the very time of the filing of the petition in bankruptcy.)

"3. The idea of using the 'free funds' for the making of special settlements was a part of the plan, known and agreed to by the consenting creditors, and was designed for the purpose of trying to complete the plan, of which the special settlements were a part.

"4. The Special Master, after a full hearing of all the facts, found that the plan was not completed prior to the filing of the petition.

"5. The District Judge found that it was not a completed plan, and the evidence overwhelmingly supports the findings of the Master and the District Judge to this effect.

"6. Counsel for Mr. Wright in at least a dozen places in his brief refers to the voluntary plan as a 'partially completed plan' or a 'partially executed plan,' and I fail to find any earnest contention on the part of counsel that the voluntary plan was a completed one.

"I recognize that if the premise of the majority that the voluntary plan was completed before bankruptcy was correct its conclusion would necessarily follow, but since the premise is supported by neither the law nor the facts the conclusion must fall." (R. 1870-71).

In the majority opinion, relative to this question of fact, the Court said:

"What is significant is that the City in 1937 completed and thereafter entirely abandoned the voluntary plan it had offered in 1936, and secured the acceptance of in 1937, and that the present proceeding is an entirely new proceeding and in no proper sense a completion of that plan." (R. 1866).

There is, therefore, a very serious conflict in the Court itself and between the appellate court and the trial court on this very important question.

The Master, a lawyer of long and successful practice at the bar and who has been a Master in many important cases, who gave much time to the taking of the testimony and consideration of the case, found as follows:

"I find from the evidence the following facts:

"That the Plan of Composition adopted in Ordinance 269, December 23, 1936, as amended by Ordinance 289, adopted September 4, 1937, was not completed because a small percentage of creditors did not accept the plan.

"That the document of December 24, 1936, the contract with the Barker Committee and the contract with Exselsen were all steps taken in a bona fide effort to bring about the acceptance of the Plan of Composition.

"That the continued exchanges of securities with certain creditors and settlements with other creditors were made in good faith in an effort to bring about the acceptance of the Plan of Composition.

"That the conduct of the City's representatives was pursued in the ordinary course of business without concealment or deceit, and with no purpose to withhold information." (R. 325-6)

• • • • • • •

"That the contract with Coral Gables Development Company was entered into in good faith as the best practical means of realizing on the City's delinquent assets derived under Section 12 of the Plan of Composition." (R. 326)

• • • • • • •

"The efforts of the City's representatives, by means of the document of December 24, 1936, the contract with the Barker Committee, the contract with Exselsen and by other means brought out in the evidence whereby they sought in good faith to carry out the City's Plan of Composition and avoid bankruptcy, did not vitiate the Plan of Composition." (R. 327)

The Master in his report further said:

> "Since the enactment of Sub-section J, municipalities are permitted by law to carry out a partially completed plan of composition even after the lapse of years.
>
> "The petitioner was within its legal rights to postpone bankruptcy proceedings in the hope and effort to secure unanimous acceptance of its Plan of Composition." (R. 327)

Likewise, the District Judge, after exceptions had been filed to the Master's Report and after lengthy arguments from both counsel for the respondents and the City, arrived at this conclusion:

> "During the fall of 1937, and from time to time thereafter, various creditors of the City were dealt with and settlements were made with some creditors, and some of these creditors received larger percentages of realization on their debts than other creditors who had accepted refunding bonds. But in all of the settlements, which were completed with cash payments, the record shows there was a good faith effort on the part of the City, and there was never a departure from the effort of the City to effect the proposed refunding settlement with all of its creditors. These special settlements can well be justified as consistent with the plan, (1) by reason of the pressing circumstances of litigation, and (2) the use of so-called free funds in the effecting of settlements. Also it is worthy of comment that the sanction of holders of refunding bonds was obtained, an unnecessary precaution unless the City was keeping in effect at all times the plan for settlement with all, either as a plan of settlement or with Subsection 'J' later enacted as a plan of composition. * * * The test to be applied, I hold, is whether the City relinquished its position as a debtor to make a settlement with all the creditors. Unequal amounts paid to some creditors resulted from pressure of litigation, and other justifiable causes, constituting not an inequality in the plan, but in an at-

tempt to secure 100% acceptance, during all of which time the City had not departed from or given up its adopted plan of settlement." (R. 1777-8).

* * * * * * *

"A very painstaking member of this Bar was appointed as Special Master in this case, and the report of testimony, his rulings, and his report indicate a very careful consideration of a very lengthy case. He has with great detail dealt with the various contentions of the parties, and I think his conclusions are correct in regard to the law and facts, and his report will be affirmed." (R. 1780).

The provision in the contracts with Coral Gables and its creditors requiring 90% in amount to accept the same before it could be made effective, is similar to the provision requiring 75% in the City of Homestead plan, and it was held in the case of *Davis* v. *City of Homestead*, 5 Cir., 112 F. 2d 438, Certiorari denied 311 U. S. 678, 85 L. Ed. 436, 61 S. C. 45, that such a provision was not one for closing the plan and taking no further consents after 75% in amount of acceptances had been obtained.

We submit, therefore, that a review of this important case is necessary in the light of these findings, and that we should be permitted to point out to this Court wherein the evidence is overwhelmingly in support of our contention that the plan was not fully completed and the Municipal Bankruptcy Act is available to the debtor city under the amendment, subsection (j).

Furthermore, the Circuit Court of Appeals, to sustain its contention that the plan had been completed and abandoned, gave weight to the contention of appellants as stated in the opinion, as follows:

"They point out that the voluntary plan had been accepted in 1937 under an express understanding that

> bankruptcy would not be resorted to and that after it was completed by securing acceptance of at least 90 per cent, the City could then go about making voluntary and preferential settlements with other creditors." (R. 1864).

The record does not disclose any evidence to support the statement that the voluntary plan had been accepted in 1937 under any such express understanding that bankruptcy would not be resorted to. There was no such agreement with the creditors who voluntarily exchanged their bonds, nor with any other creditors. The possibility of the City resorting to bankruptcy was anticipated in its agreement with Fiduciary Counsel, Inc. (R. 1715). On this point the Master did make a finding:

> "In the case of Fiduciary Counsel, Inc., it was agreed that if the City should resort to bankruptcy, the claim should be restored to its status quo ante." (R. 332).

But as to this agreement the Master further said:

> "I find as a matter of law that an agreement not to resort to bankruptcy is futile and unenforceable * * * ." (R. 332).

This is the only evidence in the record upon which the Court could base such a statement as that set forth above.

We, therefore, further submit that, in making these findings of fact contrary to the findings of the Master and the District Judge, the Circuit Court of Appeals did not clearly point out where such findings were erroneous, and for this reason this cause should be reviewed.

Conclusion.

For the above reasons we respectfully submit that the writ of certiorari should be granted, the judgment and

opinion of the court below reversed, and the interlocutory decree of the District Court affirmed.

Respectfully submitted,

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Miami, Florida, September 25, 1943.

REDFEARN & FERRELL,
Of Counsel.

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